

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

CMFG LIFE INSURANCE COMPANY,
CUMIS INSURANCE SOCIETY, INC., and
MEMBERS LIFE INSURANCE COMPANY,

Plaintiffs,

Case No. 13-cv-00580

v.

JPMORGAN SECURITIES, LLC, BEAR
STEARNS, & CO. (n/k/a JPMORGAN
SECURITIES, LLC), WAMU CAPITAL CORP.,
and JPMORGAN CHASE BANK, N.A. (as
successor-in-interest to WAMU CAPITAL CORP.
and WASHINGTON MUTUAL BANK),

Defendants.

**CUNA MUTUAL'S RESPONSE TO THE COURT'S 7/2/14 ORDER
CONCERNING THE STATUTE OF LIMITATIONS FOR CUNA MUTUAL'S CLAIMS
FOR RESCISSION BASED ON MISTAKE AND UNJUST ENRICHMENT**

On July 2, 2014, the Court ordered dismissal of CUNA Mutual's claim for rescission based on misrepresentation, applying the same reasoning used in dismissing claims by CUNA Mutual against defendants in two other cases. Opinion & Order, ECF 38 (July 2, 2014) ("JPMorgan Order") (applying Opinion & Order, *CUNA Mutual v. UBS Securities*, No. 13-cv-576-wmc (ECF 40) (July 2, 2014)); *see CUNA Mutual v. Banc of America Securities, LLC*, NO. 13-cv-579-wmc (ECF 43) (July 2, 2014) (likewise applying *UBS*)). The Court concluded that the six-year limitations period for contract claims, Wis. Stat. Ann. § 893.43, applies to the claim for rescission based on misrepresentation, rather than the six-year period for claims sounding in fraud, § 893.93(1)(b), which, unlike the contract limitation period, provides that a claim accrues only on "the discovery, by the aggrieved party, of the facts constituting the fraud."

The Court noted, however, that JPMorgan had not argued that the same result applies to CUNA Mutual's claims for rescission based on mistake and unjust enrichment, and it gave CUNA Mutual the opportunity to argue why those claims are timely even if the misrepresentation claim is not. JPMorgan Order at 3 ("While the dismissal of these claims appears inevitable, the court will give CUNA Mutual 14 days to brief why this is not so."). At the outset, however, JPMorgan has waived that argument by not asserting it in its motion to dismiss. *See, e.g., Carroll v. Lynch*, 698 F.3d 561, 568 (7th Cir. 2012) ("Because not raised in her opening brief, [plaintiff] has waived this argument.").

In any event, CUNA Mutual's position is that all three claims are subject to the limitations period for claims sounding in fraud, including its discovery rule, because each of the three claims is founded on the fact of misrepresentations, whether made by mistake or otherwise by JPMorgan here (and UBS and Banc of America in the other two cases) that induced CUNA Mutual to purchase various residential mortgage-backed securities. CUNA Mutual thus acknowledges that all three claims stand or fall on the same reasoning.

CUNA Mutual respectfully disagrees with the Court's reasoning in *UBS* and as applied here. CUNA Mutual is considering whether to appeal or instead move to amend its complaint against JPMorgan (as well as against UBS and Banc of America in the separate cases), in accordance with the Court's statement in *UBS* (at 12 n.13) that "[t]he only option remaining open to CUNA Mutual is to move to amend its pleadings to bring a claim for rescission on the grounds of fraudulent (intentional) misrepresentations."

CUNA Mutual will inform the Court of its decision whether to amend by July 30, 2014. In the meantime, CUNA Mutual respectfully requests that the Court hold matters in abeyance.

Respectfully submitted,

/s/ Scott K. Attaway

Stephen M. Tillery (*pro hac vice*)
Greg G. Gutzler
Richard M. Elias
Tamara M. Spicer
Steven M. Berezney
Michael E. Klenov
John C. Craig
Michael M. Winter (*pro hac vice*)
Garrett R. Broshuis
Korein Tillery, LLC
505 North 7th Street, Suite 3600
St. Louis, MO 63101
(314) 241-4844

George A. Zelcs (*pro hac vice*)
Matthew C. Davies (*pro hac vice*)
Korein Tillery, LLC
205 North Michigan, Suite 1950
Chicago, IL 60601
(312) 641-9750

David C. Frederick (*pro hac vice*)
Silvija A. Strikis (*pro hac vice*)
Scott K. Attaway (*pro hac vice*)
Whitney C. Cloud (*pro hac vice*)
**Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.**
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Peggy A. Lautenschlager
Bauer & Bach, LLC
123 East Main Street, Suite 300
Madison, WI 53703
(608) 260-0292

Counsel for Plaintiffs

July 16, 2014